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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1247

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

As stated in our petition, the question presented in this case is whether a provision permitting a union to rescind its collective bargaining agreement to remedy a material breach by the employer—in this case breach of a valid construction industry subcontracting clause under Section 8(e) of the National Labor Relations Act—is a form of unlawful "coercion" under Section 8(b)(4) of the Act, where there is no work stoppage, picketing, etc., or any threat of such action.

The brief of the National Labor Relations Board, however, contains no real legal analysis of the question presented; nor does it specifically challenge the analysis presented in the petition.[1] Rather, the Board's brief avoids the

[1] Nor is there any discussion, let alone denial, of the reasons set forth in the petition indicating the importance of the question presented in the administration of Sections 8(e) and 8(b)(4) of the National Labor Relations Act.

Further, the Board's citation of *National Labor Relations Board v. Muskegon Bricklayers Union No. 5,* 378 F. 2d 859 (6th Cir.) is

very question presented by repeatedly labeling the right of rescission in such conclusionary terms as "a coercive means" (p. 5), "coercive conduct" (p. 7), "prohibited means of enforcement" (p. 7), "impermissibly coercive means of securing adherence to the clause" (p. 8), and "prohibited means of economic coercion" (p. 9).

Although the Board's brief begs the specific legal issue presented, it argues that the right of rescission for a material breach of contract is "particularly inharmonious with federal labor policy" (p. 8) and runs counter to a "strong policy against dislocation of union-management relations" (p. 10). The basic fallacy in this "policy" argument is that it assumes that a right to rescind is inherently destructive of stable labor-management relations and can never be utilized. This overlooks several points. First, the position stated in the brief, that termination clauses are always inimical to federal labor policy, goes beyond the holdings both of the Board and the courts. Thus, in the *Amalgamated Lithographers* case discussed at pages 10-11 of the petition, the Board held in the circumstances of that case that the "right to terminate" clause utilized to give the union a remedy for breach of other contract clauses *was lawful.* Similarly, the cases cited at footnote 12 of the petition demonstrate that the courts too have accepted the rescission principle in the context of labor-management relations and have held that the right of rescission is available to one party to a collective bargaining agreement where there is a material breach of that agreement by the other party. Indeed, the point could not have been more

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erroneous. The provision in issue there permitted a strike (a plainly prohibited means of enforcing construction union subcontracting clauses) in the event of breach of the no subcontracting restriction. The entire distinction drawn in our petition, however, was between such direct forms of economic action prohibited by Congress in 1959 and the various forms of judicial and traditional legal sanctions which may be used to enforce such agreements.

forcefully stated than by the District of Columbia Circuit in *United Electrical Workers* v. *NLRB*, 223 F. 2d 338, at 341:

> "It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts."

Compliance with labor agreement clauses expressly validated by the Congress is an important part of "federal labor policy." It is noteworthy in this regard that the termination provision involved in this case served not to disrupt the relationship between the contracting parties, but had precisely the opposite effect. Thus, Ets-Hokin, having first admittedly breached the subcontracting provision in issue, finally agreed to live up to its commitments after the termination provision was brought to its attention![2] It is respectfully submitted that the statute itself is a better guide to the policy intended by the Congress than the opinions expressed by the Government attorneys in an appellate brief.

Finally, the Board's brief contends (p. 11) that a union may not itself invoke a right to rescind the contract even though a court might find that rescission is an appropriate remedy in a given case. This contention is completely at odds with centuries of established contract law, beginning in early canon law,[3] that the right to rescind an agreement and to refuse to perform further is that of the injured party:

> "On a material breach of the contract *the injured party* may elect to rescind the contract or to stand on it. A party may retain the benefit of a contract and sue

[2] Although the Board's brief attempts to place stress upon the multiplicity of Ets-Hokin-IBEW agreements, this tactic can only be viewed as a distraction. The Board's position, that a provision for rescission in the case of a material breach is unlawful, would be precisely the same if only one agreement were involved.

[3] Williston, Contracts, Sec. 893(a).

for damages for a breach of a part of the contract." 17 A C. J. S. *Contracts* Sec. 422(1), at p. 521 (1963). (Emphasis supplied.)

This final contention of the Board is thus contrary to the traditional and fundamental concept of election of remedies by the injured party. It is also totally unresponsive to the question of whether, as a matter of law, the reservation of this remedy is a prohibited form of economic "coercion" under the Act.

Conclusion

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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